

REPRESENTATIVE FOR PETITIONER:
Brad Hasler, Bingham McHale LLP
Edwin K. DeWald, DeWald Property Tax Services

REPRESENTATIVES FOR RESPONDENT:
Kirk E. Reller, Patoka Township Assessor
Marvin M. Folkerts, Contractor for Patoka Township Assessor
Natalie Jenkins, Dubois County Property Tax Assessment Board of Appeals
Raymond Lucken, Dubois County Assessor

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

Lincoln Village LP (LVIII),)	Petition Nos.: 19-017-03-1-4-00002
)	19-017-04-1-4-00001
Petitioner,)	19-017-05-1-4-00003
)	
v.)	Parcel: 017-02480-00
)	
)	County: Dubois
Patoka Township Assessor,)	Township: Patoka
)	Assessment Years: 2003, 2004, & 2005
Respondent.)	

Appeal from the Final Determination of
Dubois County Property Tax Assessment Board of Appeals

October 10, 2006

FINAL DETERMINATION

The Indiana Board of Tax Review (the Board) having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ISSUE

1. The issue presented at the hearing for consideration by the Board is whether the subject property tax assessments for tax years 2003, 2004 and 2005 are over-stated based on appraisals of the property obtained for the purpose of establishing market value-in-use for each tax year.¹ *Petitioner Exhibits 1-3.*

PROCEDURAL HISTORY

2. Pursuant to Ind. Code § 6-1.1-15-1, Edwin K. DeWald, on behalf of Lincoln Village LP (LVIII) filed Form 131 Petitions for Review of Assessment, petitioning the Board to conduct an administrative review of the above petitions. For 2003, the Dubois County Property Tax Assessment Board of Appeals (the PTABOA) issued its determination on December 17, 2004. The Petitioner filed its Form 131 petition for tax year 2003 on January 13, 2005. For 2004 and 2005, the PTABOA issued its determinations on December 6, 2005. The Petitioner filed Form 131 petitions for tax years 2004 and 2005 on January 3, 2006.

HEARING FACTS AND OTHER MATTERS OF RECORD

3. Pursuant to Ind. Code § 6-1.1-15-4 and § 6-1.5-4-1, the duly designated Administrative Law Judge (the ALJ), Rick Barter, held a hearing on July 11, 2006, in Jasper, Indiana.
4. The following persons were sworn and presented testimony at the hearing:

¹ The Petitioner's Forms 131 alleged disparate assessment treatment and raised the argument that the subject property's assessment should have an external economic obsolescence adjustment applied as a result of the encumbrances placed on the property by IRS Section 42 rules. These issues, however, were not addressed at the hearing. Further, documentary evidence that had been attached to the Form 131 in support of these allegations was not submitted into evidence at the hearing, and as such was not considered by the Board. An additional issue on the Form 131 petitions concerning the number of extra plumbing fixtures for which the Petitioner was assessed for tax years 2003, 2004 and 2005 was withdrawn by the Petitioner's representative at the hearing.

For the Petitioner:

Edwin K. DeWald, DeWald Property Tax Services,
Randy Warner, DeWald Property Tax Services,
Phillip D. Johns, appraiser, The Value Company,

For the Respondent:

Kirk E. Reller, Patoka Township Assessor,
Marvin M. Folkerts, Tyler/CLT Co., Contractor to township assessor,
Natalie Jenkins, Dubois County PTABOA,
Raymond Lueken, Dubois County Assessor.

5. The Petitioner presented the following exhibits:²

Petitioner Exhibit 1 – Appraisal by The Value Company dated June 30, 2006 for tax year assessment date March 1, 2003,
Petitioner Exhibit 2 – Appraisal by The Value Company dated June 30, 2006 for tax year assessment date March 1, 2004,
Petitioner Exhibit 3 – Appraisal by The Value Company dated June 30, 2006 for tax year assessment date March 1, 2005,
Petitioner Exhibit 4 – Petitioner’s Hearing Brief regarding Section 42 tax credits for tax year assessment date March 1, 2003.

6. The Respondent presented the following exhibits:³

Respondent Exhibit 1 – Summary of contentions,
Respondent Exhibit 2 – Confidential Form 136 and attachments,
Respondent Exhibit 3 – Subject property record card,
Respondent Exhibit 4 – Notice of Appearance of Consultant on behalf of assessor,
Respondent Exhibit 5 – Witness list,
Respondent Exhibit 6 – Copies of Forms 131, 115 and 130 for the subject property,
Respondent Exhibit 7 – Notice of Hearing,
Respondent Exhibit 8 – Respondent’s rebuttal of appraisals,

² The Petitioner’s attorney designated Petitioner Exhibits 1-3 as confidential information.

³ The Respondent designated Respondent Exhibit 2 as confidential information.

7. The following additional items are officially recognized as part of the record of proceedings and labeled Board Exhibits:

Board Exhibit A – Form 131 Petition,
Board Exhibit B – Notice of Hearing dated May 1, 2006,
Board Exhibit C – Hearing Sign-in Sheet.
Board Exhibit D – Withdrawal of issue agreement
Board Exhibit E – Notice of County Assessor Appearance as an Additional Party

8. The subject property is a commercial apartment complex located at 1 Medical Arts Drive in Patoka Township, Huntingburg.
9. The ALJ did not conduct an on-site inspection of the subject property.
10. For 2003, the PTABOA determined the assessed value of the property to be \$4,100 for the land and \$1,614,300 for the improvements, for a total assessed value of \$1,618,400. For 2004, the PTABOA determined the assessed value of the property to be \$35,700 for the land and \$1,614,300 for the improvements, for a total assessed value of \$1,650,000 and for 2005, the PTABOA determined the assessed value of the property to be \$35,700 for the land and \$1,614,300 for the improvements, for a total assessed value of \$1,650,000.
11. For 2003, the Petitioner contends the assessed value of the property should be \$420,000. For 2004, the Petitioner contends the assessed value of the property should be \$450,000 and for 2005 the Petitioner contends the assessed value of the property should be \$430,000.

JURISDICTIONAL FRAMEWORK

12. The Indiana Board is charged with conducting an impartial review of all appeals concerning: (1) the assessed valuation of tangible property; (2) property tax deductions; and (3) property tax exemptions; that are made from a determination by an assessing

official or a county property tax assessment board of appeals to the Indiana board under any law. Ind. Code § 6-1.5-4-1(a). All such appeals are conducted under Ind. Code § 6-1.1-15. See Ind. Code § 6-1.5-4-1(b); Ind. Code § 6-1.1-15-4.

ADMINISTRATIVE REVIEW AND THE PETITIONER'S BURDEN

13. A Petitioner seeking review of a determination of an assessing official has the burden to establish a prima facie case proving that the current assessment is incorrect, and specifically what the correct assessment would be. See *Meridian Towers East & West v. Washington Twp. Assessor*, 805 N.E.2d 475, 478 (Ind. Tax Ct. 2003); see also, *Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230 (Ind. Tax Ct. 1998).
14. In making its case, the taxpayer must explain how each piece of evidence is relevant to the requested assessment. See *Indianapolis Racquet Club, Inc. v. Wash. Twp. Assessor*, 802 N.E.2d 1018, 1022 (Ind. Tax Ct. 2004) (“[I]t is the taxpayer's duty to walk the Indiana Board . . . through every element of the analysis”).
15. Once the Petitioner establishes a prima facie case, the burden shifts to the assessing official to rebut the Petitioner's evidence. See *American United Life Ins. Co. v. Maley*, 803 N.E.2d 276 (Ind. Tax Ct. 2004). The assessing official must offer evidence that impeaches or rebuts the Petitioner's evidence. *Id.*; *Meridian Towers*, 805 N.E.2d at 479.

ANALYSIS

16. The Petitioner contends that the subject property's assessments for tax years 2003, 2004 and 2005 are over-stated based on the property's value estimated in an appraisal prepared for each tax year. *DeWald testimony*. In support of this contention, the Petitioner presented a summary appraisal of the subject property for tax years 2003, 2004 and 2005, prepared by a licensed appraiser. *Petitioner Exhibits 1 - 3*. The appraisals used the

income capitalization approach to value and estimated the property's value to be \$420,000 for tax year 2003, \$450,000 for tax year 2004, and \$430,000 for tax year 2005.

17. In support of its value, the Petitioner presented the following testimony and other evidence:
 - A. The Petitioner submitted appraisals for the subject property estimating the property's January 1, 1999, value for tax years 2003, 2004 and 2005, based on the income and expenses for each of the assessment years under appeal. *Hasler argument; Petitioner Exhibits 1-3*. The appraisals were prepared by a licensed Indiana appraiser in accordance with Uniform Standards of Professional Appraisal Practice (USPAP). *Johns testimony*. The appraisals establish the market value of the subject property to be \$420,000 for 2003, \$450,000 for 2004 and \$430,000 for 2005. *Petitioner Exhibits 1 -3*.
 - B. The Petitioner's appraiser, Mr. Phillip D. Johns, testified that he considered all three approaches to value, including the cost approach, the sales comparison approach, and the income capitalization approach to value, but that he elected to estimate the property's value from only the income capitalization in his final opinion. *Johns testimony*. According to Mr. Johns, he excluded the cost approach because it is not an accurate opinion of true tax value primarily because of the obsolescence caused by the use restrictions. *Id.* The appraiser further testified that he excluded the sales comparison approach because, he contends, the quality and quantity of the sales data is insufficient to provide an accurate estimate of the value of this type of property. *Id.*
 - C. The Petitioner's appraiser argues that the subject property has a specific use in that the apartments can only be rented to qualified low-income tenants. *Johns testimony*. Therefore, to determine "market rents," the appraiser testified that he analyzed the actual rents for the subject property and calculated the "potential gross income" to be \$167,640 for each tax year. *Id.; Petitioner Exhibits 1-3 at 26-27*. The appraiser

further testified that he considered extra income sources for the property, and estimated the stabilized income would be \$173,440 for 2003, \$173,640 for 2004, and \$174,540 for 2005. *Id.* The appraiser also observed the vacancy trend and considered the owner's "free rent for a month" incentive to keep the property occupied. *Id.* According to the appraiser, he applied a 20% reduction for vacancy and collection loss. *Id.* Based on these calculations, the Petitioner's appraiser determined the effective gross income of the property to be \$138,740 for 2003, \$139,640 for 2004, and \$139,640 for 2005. *Id.*

D. Next, the Petitioner's appraiser testified that he analyzed the expenses for the subject property and the expenses of twenty-one similar subsidized apartment projects. *Johns testimony; Petitioner Exhibits 1-3 at 27-29.* The appraisal concluded that the only unusual expense was the subject property's higher utility costs.⁴ *Id.* Therefore, Mr. Johns chose to use the property-specific expenses of \$89,220 in 2003, \$88,120 in 2004, and \$90,220 to determine the net operating income for each year. *Id.*; *Petitioner Exhibits 1-3 at 27-29.* According to the appraiser, the net operating income for the property is \$49,520 for 2003, \$50,820 for 2004, and \$49,420 for 2005. *Id.*

E. The Petitioner admits that the preferred way to arrive at a capitalization rate is from the sales of similar properties. *Johns testimony.* Mr. Johns argues, however, that there is a lack of sufficient sales for Section 42 apartments and that the existing sales reflect the value of intangible property such as tax credits in the sale price. *Johns testimony; Petitioner Exhibits 1-3 at 30-33.* Thus, Mr. Johns testified, he developed the capitalization rate by using the Mortgage Equity Band of Investment method and then adding the tax rate. *Johns testimony.* According to the appraiser, applying this capitalization rate to the net operating income for the property for each assessment year under appeal and trending the calculated values to January 1, 1999, yields a value of \$420,000 for 2003, \$450,000 for 2004 and \$430,000 for 2005. *Id.*

⁴ According to Mr. Johns, this raised the expenses per unit for the subject property. *Johns testimony.*

- F. In its rebuttal case, the Petitioner argues that tax credits should not be considered in the value of the subject property. *Hasler argument*. According to the Petitioner, Indiana Code § 6-1.1-4-40 prohibits the value of federal income tax credits from being considered in determining the assessed value of low income housing tax credit property as of March 1, 2004. *Id.*; *Petitioner Exhibit 4*. Similarly, the Petitioner argues, because tax year 2003 applies the same market-value-in-use standard as tax years 2004 and 2005, the credits should not be considered in the assessed value for 2003. *Id.*
18. The Respondent contends that the appraisals submitted by the Petitioner include two key values, “vacancy and collection loss” and “operating expenses,” that are over-stated, and that income capitalization calculations using more appropriate figures for those values results in more accurate market value-in-use figures. *Jenkins testimony; Folkerts testimony; Respondent Exhibit 8*. In support of this contention, the Respondent submitted a memorandum detailing the information that, it alleges, justifies lower values for “vacancy and collection loss” and “operating expenses” and also a change to the capitalization rate. *Id.* Based on this information, the Respondent proposed values of \$831,100 for 2003, \$922,800 for 2004, and \$952,600 for 2005, for the subject property. *Folkerts testimony; Respondent Exhibit 8*. The Respondent further contends that the value of tax credits earned by the subject property as an IRS Section 42-qualifying property should be included in the assessed value for tax year 2003. *Reller testimony*.
19. The Respondent presented the following testimony in regard to the issue:
- A. The Respondent contends that the Petitioner’s appraisals contain figures representing values for “vacancy and collection loss” and “operating expenses” that are over-stated when compared to figures for nearby similar properties. *Folkerts testimony; Respondent Exhibit 8*. The Respondent testified that, if the Board accepts the values used in the Petitioner’s three appraisals but changes the “vacancy and collection loss”

and “operating expenses” values to reflect typical and reasonable values, the resulting values for the property would be \$831,100 for 2003, \$922,800 for 2004 and \$952,600 for 2005 using the Respondent’s proposed capitalization rate. *Id.*

- B. The Respondent contends that the “vacancy and collection loss” value used in the Petitioner’s appraisals is over-stated. *Jenkins testimony, Folkerts testimony.* According to the Respondent, data provided by the Petitioner for a different segment of the Petitioner’s properties, Lincoln Village II, shows an average vacancy and collection loss for 2001 through 2003 of four percent. *Id.; Respondent Exhibit 8.* Further, financial statistics for a property cited by Petitioner in its Form 130 evidence as a “comparable” property, Knoll Ridge Plaza Apartments, show an average vacancy and collection loss rate for the years 2000 through 2003 of five percent. *Id.* According to the Respondent, these two apartment facilities, are both rent-subsidized for income-qualified tenants, are operating in the same market as the subject property, and are subject to the same forces of supply and demand. *Id.* Thus, the Respondent contends, a five percent per year vacancy and loss collection rate more accurately reflects a reasonable and typical rate and results in a total vacancy and collection loss of \$8,672 for 2003, \$8,682 for 2004 and \$8,727 for 2005.⁵ *Id.*
- C. The Respondent similarly contends that the net operating expenses used by the Petitioner’s appraiser are over-stated when compared to the average expenses cited by the Petitioner in its appraisals. *Folkerts testimony, Respondent Exhibit 8.* The Respondent argues that the Petitioner used data from twenty-one government-subsidized rental housing complexes that it identified as comparable to the subject property. *Id.* According to the Respondent, the data for the twenty-one properties

⁵ The Respondent also argues that the appraiser notes “...that a prudent landlord would charge the highest rents the market would be willing to pay” and “the subject’s rents are lower than the maximum allowable rents.” *Id.* Further, Respondent notes the appraiser states that “a project which is consistently operating at or near 100% occupancy likely is charging less than what the market will bear. Conversely, a project which is consistently operating at or below 80% occupancy is likely charging an above-market rate.” *Id.* Respondent subsequently contends that the appraiser, by opting to use a 20% vacancy rate, is effectively saying that the rents are above market levels when he has also said that the subject property’s rents are lower than the maximum allowable rents for subsidized units. As such, Respondent concludes, the vacancy and loss collection rate is over-stated in the appraisals. *Id.*

shows an average expense per unit of \$2,647 while the appraiser used a “per-unit” expense for the subject property of \$2,974 for 2003, \$2,937 for 2004, and \$3,007 for 2005. *Id.* The Respondent rejected the Petitioner’s explanation that utility costs for 2003 and 2004 were higher than average because, the Respondent argues, the subject property was built in 2001 and would be expected to be more energy efficient than older facilities. *Id.* As such, the Respondent concludes, the operating expenses used in the appraisals are over-stated and would be more appropriately valued at \$2,647 per unit for each of the three years under appeal, or a total of \$79,410 per year. *Id.*

D. The Respondent also argues that the subject property is under-valued in the Petitioner’s appraisals based on the Petitioner’s valuation of the property in its financial statements, based on the property’s construction cost, and based on the sale of comparable properties. *Jenkins testimony.* According to the Respondent, the Petitioner’s consolidated financial statements value the buildings and the improvements at over \$4 million dollars. *Id.; Respondent Exhibit 2.* Further, the Respondent contends, the construction of the building cost \$1,360,000. *Respondent Exhibit 6.* The Respondent also testified that two similar properties sold nearby, including Lincoln Village II, a 30-unit complex which sold on October 12, 2000, for approximately \$900,000. *Id.; Respondent Exhibit 1 at 5.*

E. Finally, the Respondent contends that the value of the Section 42 tax credits should be included in any 2003 assessment. *Reller testimony.*

29. The 2002 Real Property Assessment Manual (the MANUAL) defines the “true tax value” of real estate as the “market value-in-use of a property for its current use, as reflected by the utility received by the owner or similar user, from the property.” 2002 REAL ASSESSMENT MANUAL – VERSION A at 2 (incorporated by reference at 50 IAC 2.3-1-2). A taxpayer may use any generally accepted appraisal method as evidence consistent with the Manual’s definition of true tax value, such as sales information regarding the subject property or comparable properties that are relevant to a property’s market value-in-use, to

establish the actual true tax value of a property. *See* MANUAL at 5. Thus, a taxpayer may establish a prima facie case based upon an appraisal quantifying the market value of a property through the use of generally recognized appraisal principles. *See Meridian Towers*, 805 N.E.2d at 479 (holding that the taxpayer established a prima facie case that its improvements were entitled to a 74% obsolescence depreciation adjustment based on an appraisal quantifying the improvements' obsolescence through cost and income capitalization approaches).

30. Regardless of the approach used to prove the market value-in-use of a property, Indiana's assessment regulations provide that for the 2002 general reassessment, a property's assessment must reflect its value as of January 1, 1999. *Long v. Wayne Township Assessor*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005); MANUAL at 4. Consequently, a party relying on market value evidence to establish the value-in-use of a property must provide some explanation as to how the sales or appraised value demonstrates or is relevant to the property's value as of January 1, 1999. *Id.*

20. Here, the Petitioner submitted into evidence three appraisals for the subject property with effective dates of March 1, 2003, March 1, 2004, and March 1, 2005, respectively. *Petitioner Exhibit 1-3*. The appraisals estimated the market value of the subject property based on the income capitalization method of valuation and trended the value determined for each tax year to the January 1, 1999, statutory valuation date. *Id.* The Petitioner's appraiser concluded that the property's value was \$420,000 for 2003, \$450,000 for 2004, and \$430,000 for 2005. *Id.* An appraisal performed in accordance with generally recognized appraisal principles is sufficient to establish a prima facie case. *See Meridian Towers*, 805 N.E.2d 475, 478.

31. Once the Petitioner establishes a prima facie case, the burden shifts to the assessing official to rebut the Petitioner's evidence. *See American United Life Ins. Co. v. Maley*, 803 N.E.2d 276 (Ind. Tax Ct. 2004). The assessing official must offer evidence that impeaches or rebuts the Petitioner's evidence. *Id.*; *Meridian Towers*, 805 N.E.2d at 479.

Here, the Respondent contends that the Petitioner's appraisal over-states the vacancy and collection loss and operating expense figures. According to the Respondent, two similar rent-subsidized apartment complexes have average vacancy and collection losses of four and five percent respectively for the years 2001 through 2003.⁶ *Respondent Exhibit 8*. Similarly, the twenty-one government-subsidized rental housing complexes used by the Petitioner in its appraisals shows an average expense per unit of \$2,647 while the appraiser used a "per-unit" expense for the subject property of \$2,974 for 2003, \$2,937 for 2004 and \$3,007 for 2005. *Id.* According to the Respondent, if the vacancy and collection loss and operating expenses are corrected to reasonable and typical values, the market value-in-use of the property would be \$831,100 for 2003, \$922,800 for 2004 and \$952,600 for 2005 using the Respondent's capitalization rate. *Id.* The Respondent argues that these values more accurately reflect the property's value based on the Petitioner's valuation of the property in its financial statements, the property's \$1,360,000 construction cost, and the sale of a comparable property for \$900,000 in 2000.

32. The Petitioner raised a prima facie case that the property was over-valued for 2003, 2004 and 2005 on the basis of its appraisals. The Respondent impeached and rebutted that evidence by showing that the values used by the Petitioner's appraiser in its income approach to value were not typical or reasonable. We find the weight of the evidence supports the Respondent's contentions. As the Indiana Tax Court has stated, variances in income or expenses may reflect elements other than value of the property, "such as quality of management, skill of the work force, competition and the like." *Thorntown Telephone Company, Inc. v. State Bd. of Tax Comm'rs*, 588 N.E.2d 613, 619 (Ind. Tax Ct. 1992). The Respondent has shown that the Petitioner's higher values for vacancy and collection loss and higher expenses are not reasonable or typical for the market. Thus, such costs and expenses do not reflect the value of the property but may reflect other elements "such as quality of management." Therefore, considering the sale of

⁶ Lincoln Village, L.P. "Report on Audit of Financial Statements" for December 31, 2005 and 2004 shows a vacancy loss and rent incentive totaling approximately 6% in each year. *Respondent Exhibit 2*.

Lincoln Village II for \$900,000 and the construction cost for the subject property, the Board finds that the weight of the evidence supports a value of \$851,000 for 2003, \$899,000 for 2004, and 879,000 for 2005.⁷

33. The Respondent further contends that the value of the Section 42 tax credits should be included in any 2003 assessment. This argument fails, however, because the Respondent did not provide any evidence of the value of the tax credits. Statements that are unsupported by probative evidence are conclusory and of no value to the Board in making its determination. *Whitley Products, Inc. v. State Board of Tax Commissioners*, 704 N.E.2d 1119 (Ind. Tax Ct. 1998).

SUMMARY OF FINAL DETERMINATION

36. The Petitioner raised a prima facie case. The Respondent impeached the Petitioner's income capitalization calculation and submitted rebuttal evidence regarding comparable sales and construction cost information. Based on the weight of the evidence, the Board finds that the value of the subject property is \$851,000 for 2003, \$899,000 for 2004, and \$879,000 for 2005.

This Final Determination of the above captioned matter is issued by the Indiana Board of Tax Review on the date first written above.

Commissioner, Indiana Board of Tax Review

⁷ The Respondent used a different capitalization rate than the Petitioner's appraiser. The Respondent, however, failed to offer any evidence substantiating the rate. The Board, therefore, finds the Petitioner's capitalization rate is the appropriate rate to be used in the income approach calculation.

IMPORTANT NOTICE

- APPEAL RIGHTS -

You may petition for judicial review of this final determination pursuant to the provisions of Indiana Code § 6-1.1-15-5. The action shall be taken to the Indiana Tax Court under Indiana Code § 4-21.5-5. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice. You must name in the petition and in the petition's caption the persons who were parties to any proceeding that led to the agency action under Indiana Tax Court Rule 4(B)(2), Indiana Trial Rule 10(A), and Indiana Code §§ 4-21.5-5-7(b)(4), 6-1.1-15-5(b). The Tax Court Rules provide a sample petition for judicial review. The Indiana Tax Court Rules are available on the Internet at <http://www.in.gov/judiciary/rules/tax/index.html>, The Indiana Trial Rules are available on the Internet at http://www.in.gov/judiciary/rules/trial_proc/index.html. The Indiana Code is available on the Internet at <http://www.in.gov/legislative/ic/code>.